No. 85-203

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BARBARA M. SIMS,

Petitioner,

vs.

HONS. LAWRENCE H. COOKE, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

Does a suit under 42 U.S.C. §1983 for injunctive and declaratory relief lie against the members of the highest court of a state where the complaint alleges that their removal of a Black lower court judge was motivated by racial considerations? The United States Court of Appeals for the Second Circuit held that it did not.

Parties

Barbara M. Sims, petitioner,[1] and Hons. Lawrence H. Cooke, Matthew J. Jasen, Hugh Jones, Sol Wachtler, Bernard F. Meyer, Richard D. Simons and Judith F. Kaye, respondents.

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[1]Although the complaint included seven of petitioners's constituents as parties plaintiff, this petition is filed on her behalf alone. Since the action is now moot against them, the Commissioners

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Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, apparently unreported, is reprinted in full as Appendix A. The orders of the United States District Court for the Eastern District of New York, Bramwell, D.J., of October 24, 1984 (denying petitioner's motion for temporary injunctive relief and respondents' motion to dismiss the complaint), and of November 23, 1984 (dismissing the complaint on the ground of lack of jurisdiction) also apparently unreported, are reprinted in full as Appendices B and C.

(Footnote Continued)
of the Board of Elections of Erie County, New York, parties defendant below, are not included as respondents herein.

Jurisdictional Statement

The judgment of the United States Court of Appeals for the Second Circuit was entered on May 7, 1985. This petition for a writ of certiorari was filed within ninety (90) days of May 7, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254.

Constitutional Provisions Involved

The Thirteenth Amendment to the Constitution of the United States provides, in pertinent part, as follows: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States. . ."

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, as follows: "No state shall make or enforce any law

which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

On or about September 19, 1984, petitioner filed her verified complaint with the Clerk, United States District Court for the Eastern District of New York. App. D at 18a-57a. In essence, she sought, insofar as respondents were concerned, preliminary and permanent injunctions directing them to rescind and vacate their order of March 29, 1984, removing petitioner from the elective position of Associate Judge of the City Court of the City of Buffalo, New York, and a declaratory judgment declaring that

it was constitutionally impermissible for said petitioners to remove her from said position. App. D. at 54a-55a. The complaint alleged, in ¶45 thereof, that the actions of the said respondents in directing her removal were racially motivated, in violation of the Thirteenth and Fourteenth Amendments to the Constitution of the United States, and constituted, as well, a violation of the Equal Protection Clause of the latter amendment. App. D at 44a.

At the same time, petitioner moved, by order to show cause, for a preliminary injunction directing respondents to "rescind and vacate" their order removing her and to restore her to her former judicial position with back pay and benefits. App. E at 57a-59a. Thereupon, respondents cross-moved for an order dismissing the complaint, on the ground, inter alia, that federal district courts

lacked jurisdiction to review state court determinations of federal constitutional questions. App. F at 60a-62a.

Both motions came on to be heard before the trial judge on or about October 22, 1985. After hearing oral argument, the court on October 24, 1984, issued a decision-order denying both petitioner's motion for temporary injunctive relief and respondent's motion to dismiss the complaint. App. B at 7a-9a. On or about November 5, 1984, respondents answered the complaint. App. H at 67a. At the same time, they moved for reargument, this time additionally represented by Hon. Charles D. Breitel, former chief judge of the New York Court of Appeals. App. G at 63a-65a. On November 23, 1984, immediately after hearing further oral argument from counsel for the parties, the trial court issued a decision and order dismissing

the complaint on the ground that the district court lacked subject matter jurisdiction. App. C at 10a-17a.

On or about May 7, 1984, the court below affirmed the November 23, 1984 order of the district court dismissing the complaint. App. A at 1a-3a.

Reasons for Granting the Writ

The courts below have held that a complaint under 42 U.S.C. §1983 for injunctive and declaratory relief, against the members of the highest court of a state, which alleges that its order removing a duly elected Black judge from her position was racially motivated, does not state a justiciable cause of action and was properly dismissed. The import of this decision is that there is no appropriate federal remedy for actions of any court which are premised on invidious racial considerations. In arguing before

the district court, respondents took the position that "if one or more judges of the Court of Appeals had written a piece of paper or said it orally that they would set up a sanction on Judge Sims because . . . she was Black, very definitely a 1983 action would apply against that judge personally. . . Let's assume that judges did that, by gosh the remedy is definitely 1983." App. I at 80a.

This was precisely petitioner's position. Suppose, as Judge Breitel hypothesized, a majority or all of respondents decided to remove her solely because she was Black. Can it possibly be argued that §1983 would not be applicable in such a situation? Clearly, Judge Breitel argued correctly in the district court that it would. What he was saying was, essentially, that it was unthinkable that respondents could have

decided to remove petitioner because of racial considerations. In other words, he was insisting that she could not, in his opinion, succeed on the merits at trial and, therefore, should be denied her day in court. In this connection, see Jodpor Cinema, Ltd. v. Sedita, 309 F.Supp. 868 (W.D.N.Y. 1970).

It is beyond cavil that injunctive relief is available against a judge in a §1983 action. As recently as May 14, 1984, this Court held, in Pulliam v. Allen, __ U.S.__, 104 S.Ct. 1970 (1984) that "Judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity." 104 S.Ct. at 1981 (emphasis added). See also, In re Justice of Supreme Court of Puerto Rico, 695 F.2d 17 (1st Cir. 1982); Timmerman v. Brown, 528 F.2d 811 (4th Cir. 1975), rev'd on other grounds sub nom., Leeke v. Timmerman, 454

U.S. 83 (1981); Heimbach v. Lyons, 597 F.2d 344 (2d Cir. 1975); Slavin v. Curry, 574 F.2d 1256 (5th Cir. 1978), vacated as moot, 583 F.2d 779 (5th Cir. 1978); WXYZ, Inc. v. Hand, 658 F.2d 420 (6th Cir. 1981); Harris v. Harvey, 605 F.2d 330 (7th Cir. 1979), cert. denied, 445 U.S. 938 (1980); Richardson v. Koshiba, 693 F.2d 911 (9th Cir. 1982); Fernandez v. Trias Monge, 586 F.2d 848 (1st Cir. 1978); and United States v. McLeod, 385 F.2d 734 (5th Cir. 1967).

We are not here dealing with a matter of comity or res judicata as argued at some length below by respondents. Such cases as Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) and Tang v. Appellate Division, First Department, 487 F.2d 138 (2d Cir. 1973), cert. denied, 416 U.S. 906 (1974) relied upon by them, which are grounded on those principles, are hardly applicable here

where the issue is limited to subject matter jurisdiction. Decisions relating to the desire to avoid state and federal judicial conflicts or the relitigation of constitutional issues simply cannot apply to an action properly brought under §1983. See Javits v. Stevens, 382 F.Supp. 131, 136-37 (S.D.N.Y. 1974).

In Hudson Valley Freedom Theater v. Heimbach, 671 F.2d 702 (2d Cir. 1982), cert. denied, 103 S.Ct. 107 (1983), the issue before the Second Circuit was whether corporations had sufficient racial identity to sue under §1983. In deciding unanimously that §1983 was available to corporations, the court recognized the validity of a hypothetical posed by appellant's counsel. As stated by the bench: "At oral argument, appellate counsel posed the hypothetical of a city's denial of a contract to a construction company because it was owned

by blacks. We agree in finding it hard to believe that the Supreme Court would deny standing to the corporation because it 'had no racial identity and cannot be the direct target of discrimination,' while at the same time it would be obliged to deny standing to the stockholders on the sound ground that the injury was suffered by the corporation and not by them." 671 F.2d at 706.

A similar hypothetical was advanced at the district court level by the parties. Reference has already been made to respondents' example, App. I at 80a, while petitioner's was as follows:

> Let's assume the seven judges of the Court of Appeals said about this black woman judge, we are going to remove her because she is black. . . You could hardly say there would not be a cause of action under 1983, because the argument is not that you are reviewing a decision, you could tell nothing from the decision about discovery. What you can tell, what would a petition for certiorarity [sic] do? There

> would be nothing for the Supreme Court to unravel.

App. I at 78. In his first decision denying respondents' motion to dismiss the complaint, the district judge well understood the thrust of petitioner's §1983 action when he stated: "[T]here is absolutely no request in the complaint that the Court review any state court determination. Rather the complaint asks that the Court review a claim that certain alleged harms were caused by New York State officials in their review of her conduct as a judge." App. B at 9a.

In reversing himself a month later, the district judge relied on Zimmerman v. Grievance Committee on the 5th Judicial District, 726 F.2d 85 (2d Cir. 1984), cert. denied, 104 S.Ct. 2681 (1984), which he contended was "on all fours" with this case. App. B at 15a. Nothing could be further from the truth. Zimmerman involved a §1983 action brought

by an attorney who had been censured by the Appellate Division, Fourth Department, "because he listed himself [in the attorney's section of the Syracuse, New York Yellow Pages] under categories for which he lacked experience. . . " 726 F.2d at 87. In his complaint, he alleged that the Appellate Division's order of censure violated his First Amendment rights. The Second Circuit, in holding that disciplinary proceedings were judicial in nature and that aggrieved attorneys must proceed by way of certiorari, was following time-honored principles, to which petitioner subscribes.

However, in Zimmerman, everything necessary for federal appellate review was present in the existing record. Here, there is, as the district court observed in its first decision-order, no attack on the determination of the Court

of Appeals but solely and squarely on the motivation of the judges thereof in reaching it. There is no way that the validity (or invalidity) of this claim can be determined from the record herein. Only through the discovery process will petitioner ever be able to assemble a record as to whether racial discrimination played any role in her removal. In this connection, see also District Court of Appeals v. Feldman, __U.S.__, 103 S.Ct. 1303 (1983), where a constitutional attack on judicial orders denying a petition for waiver of local bar admission rules could not be continued per an independent action, based on alleged violations of the Fifth Amendment and the Sherman Anti-Trust Act.[2]

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[2]From the decision, it is impossible
(Footnote Continued)

The complaint here constitutes a classic §1983 action since the gravamen of its allegations is that petitioner was removed because she was Black. As the Court acknowledged in Pulliam, "[S]ubsequent interpretations of the Civil Rights Act by this Court acknowledges Congress' intent to reach unconstitutional actions by all state actors, including judges." 104 S.Ct. at 1980. Also see Ex Parte Virginia, 100 U.S. 339 (1879); and Mitchum v. Foster, 407 U.S. 225 (1972). In the latter case, this Court forcefully reminded us that the "very purpose of 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights -- to protect

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(Footnote Continued)
to tell whether the Feldman complaints invoked 42 U.S.C. §1983 as a source of jurisdiction.

the people from unconstitutional action under color of state law 'whether that action be executive, legislative or judicial.'" 407 U.S. at 242 (emphasis added).

Respondents conceded that, if the decision to remove petitioner was reached, as Judge Breitel argued in the district court, "because . . . she was Black," App. I at 23, "a 1983 action would apply" against any judge who decided on that basis, an interpretation that corresponds exactly with that offered by petitioner. Ibid. It simply cannot be the law that the judges of any court, high or low, cannot be sued under §1983 if they based their judicial actions on unconstitutional racial considerations. If petitioner was removed because she was Black, the parties are unanimous in agreeing that a §1983 action would be proper and, indeed,

all precedent agrees with this proposition. As Justice Blackmun stated for this Court in Pulliam, "[W]e remain steadfast in our conclusion . . . that Congress intended §1983 to be an independent protection for federal rights and find nothing to suggest that Congress intended to expand the common-law doctrine of judicial immunity to insulate state judges completely from federal collateral review." 104 S.Ct. at 1981.

This is, concededly, a delicate case involving, as it does, the judges of a state's highest court. But they stand on no better footing than did Magistrate Pulliam and, if petitioner can prove at trial that they acted because of racial animus in removing her, she would be entitled to appropriate injunctive and declaratory relief. The issue is a relatively simple yet highly important one--does a cause of action under 42

U.S.C. §1983 arise upon allegations that a judge was removed by the members of the State's highest tribunal because she was Black? The answer to that question has to be in the affirmative or this Court will be stating that, no matter how racially motivated a judicial tribunal may be, there is no relief possible under the very section of the Civil Rights Act designed to remedy such conduct. As Justice Blackmun put it in Pulliam, ". . . The Fourteenth Amendment prohibits a State from denying any person within its jurisdiction the equal protection of the law. Since a State acts only by its legislative, executive, or judicial authorities, the constitutional provisions must be addressed to those authorities, including the State's judges. Section 4 was an exercise of Congress' authority to enforce the provisions of the Fourteenth Amendment

Conclusion

Given the authorities cited herein and the decision below which insulates judges from any actions pursuant to 42 U.S.C. §1983, no matter how racially motivated their orders or judgments may be, certiorari should be granted to insure that complaints alleging invidious racial motivations by state officials, including members of the judiciary, state a justiciable cause of action.

Dated: New York, NY
August 5, 1985

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

May 7, 1985

[CAPTION OMITTED]

No. 85-7017

Present: HON. IRVING R. KAUFMAN
HON. ELLSWORTH A.VAN GRAAFEILAND

Circuit Judges

HON. MILTON POLLACK

District Judge
(sitting by designation)

Appeal from the United States District Court for the Eastern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

1. Judge Sims asserts that the district court improperly dismissed her comlaint, which sought a preliminary and permanent injunction directing the New York Court of Appeals judges to "rescind and vacate" the order removing her from her judicial position. It is well-settled, however, that review of final judgments "rendered by the highest court of a State in which a decision could be had," 28 U.S.C. §1257, may only be obtained in the United States Supreme Court. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476 (1983); Zimmerman v. Grievance Committee, 726 F.2d 85, 86 (2d Cir.) cert. denied, 104 S.Ct. 2681 (1984). Sims claims that her complaint does not seek review of the Court of Appeals decision, but rather alleges that the individual judges of that Court were motivated by a racial animus. We disagree. Sims's complaint

sought "[a] preliminary and permanent injunction directing the judicial defendants to rescind and vacate their order of March 29, 1984. . ." Because Sims requested the district court to review the decision of the New York Court of Appeals, the district court properly dismissed her complaint for lack of subject matter jurisdiction.

2. We have carefully reviewed Sims's other claims and find them to be without merit.

3. Accordingly, the order of the district court is affirmed.

IRVING R. KAUFMAN

ELLSWORTH VAN GRAAFEILAND,
Circuit Judges.

MILTON POLLACK,
District Judge.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

84 Civ. 3950

DECISION AND ORDER

[CAPTION OMITTED]

BRAMWELL, D.J.

Plaintiff Barbara Sims and others brought this action before this Court, under the First, Fifth Eighth, Thirteenth, Fourteenth, Fifteenth and Nineteenth Amendments of the Constitution of the United States and under 42 U.S.C. sections 1981, 1983 and 1985, seeking declaratory, injunctive and compensatory relief. In connection with the suit, this morning plaintiff Sims demands that the defendants show cause why certain injunctive relief should not issue enjoining the defendant Board of Elections from filling her now vacant position on the judiciary, pending determination of this action. Defendants

respond arguing that the complaint should be dismissed and that no injunctive relief should be issued.

The relevant facts of this case are as follows. Plaintiff Sims was appointed to the bench to fill an interim vacancy on January 1, 1978. In November 1978 she was elected to a full term. On October 3, 1979, plaintiff Sims appeared before the New York State Commission on Judicial Conduct (Commission) in response to a complaint involving the release of a defendant in a criminal proceeding and allegations of unethical conduct. After further investigative proceedings, plaintiff Sims was charged with different ethical violation. Subsequently, additional allegations of misconduct as to specific defendants were leveled at plaintiff Sims. On February 26, 1982, the Commission denied plaintiff's motion for summary judgment

on the charges. After a hearing on the charges, the Commission's Referee filed a report sustaining ten of the charges and dismissing one as unproved. On May 16, 1983, after oral argument, the Commission sustained the ten charges and dismissed one. The Commission also recommended censure of the plaintiff. On June 10, 1983, plaintiff requested a New York Court of Appeals review of the Commission's rulings pursuant to applicable law. On March 31, 1984, plaintiff received a written order of removal and she vacated her office. By letter dated April 5, 1984, plaintiff filed a notice of motion for a stay pending disposition of plaintiff's reargument with the Court of Appeals. On April 28, 1984, plaintiff filed a Notice of Motion for Reargument and one for disqualification of Judge Jason on ethical grounds. Both motions were

denied. The instant action and motion for injunctive relief followed.

First, the Court believes that the plaintiffs' instant motion for injunctive relief should be denied. The standard for determining whether a preliminary injunction shall be issued requires that the movant show: (1) irreparable harm; and (2) either a likelihood of success on the merits or sufficiently serious questions going to the merits to make them a fair ground for litigation, and a balance of hardships tipping decidedly in favor of the party requesting preliminary injunctive relief. The plaintiffs cannot meet the requirements of this standard since it is the Court's opinion that there are doubts regarding whether they will prevail on the merits of her claim under 42 U.S.C. §1983, or whether the issues in the case represent fair grounds for litigation.

Second, regarding defendants' arguments that the complaint should be dismissed, the Court is not persuaded. First, there is proper venue in this matter. While the defendants point to the langauge in 28 U.S.C. §1391, the Court refers them to section 1392(a) of that title. It states that: "Any civil action, not of a local nature, against defendants residing in different districts in the same State, may be grought in any of such districts. Thus, while all the defendants do not reside in the Eastern District of New York, some of them do reside here and all of them reside in New York State. Hence, the Eastern District of New York is the proper forum. Second, there is no merit to the argument that the complaint should be dismissed because a federal district court may not review a state court determination of a federal constitutional

question. There is absolutely no request in the complaint that the Court review any state court determination. Rather, the complaint asks that the Court review a claim that certain alleged harms were caused by New York State officials in their review of her conduct as a judge.

For the foregoing reasons, plaintiffs' and defendants' motions are denied.

IT IS SO ORDERED.

Dated: Brooklyn, NY
October 24, 1984

_____
U.S.D.J.

APPENDIX C

(Transcript of Hearing, United States District Court for the Eastern District of New York, November 23, 1984, 11:00 a.m., Hon. Henry Bramwell, U.S.D.J.)

(After recess)

THE COURT: Gentlemen, the court has gone over the papers in this matter and what I am going to do is put the Court's decision on the record at this time.

Plaintiffs Barbara Sims and others commenced this action pursuant to Title 42, United States Code, Sections 1981, 1983 and 1985 claiming that their rights under the First, Fifth, Eighth, Thirteenth, Fourteenth, Fifteenth, and Nineteenth Amendments of the United States Constitution were violated.

The relief the plaintiffs seek is declaratory, injunctive and compensatory in nature. This morning the defendants moved to reargue their cross-motion to dismiss the complaint for lack of subject

matter jurisdiction, which the Court originally denied on October 24, 1984. The defendants oppose the motion.

The relevant facts of this case are as follows: Plaintiff Sims was appointed to the bench to fill an interim vacancy on January 1, 1978. In November 1978 she was elected into a full term.

On October 3, 1978, Plaintiff Sims appeared before the New York State Commission on Judicial Conduct in response to a complaint involving the release of a defendant in a criminal proceeding and allegations of unethical conduct.

After further investigation proceedings, Plaintiff Sims was charged with a different ethical violation. Subsequently, additional allegations of misconduct as to specific persons were leveled at Plaintiff Sims.

On February 3, 1981, after further inquiry and additional charges, a formal complaint was served on Plaintiff Sims.

On February 26, 1982, the Cap Commission denied plaintiff's motion for summary judgment on the charges. After a hearing on the charges, the Cap Commission's referee filed a report, sustaining ten of the charges and dismissing one as unproved.

On May 16, 1983, after all argument, the Cap Commission sustained the ten charges and dismissed the one.

The Commission also recommended censure of the Plaintiff.

On June 10, 1983, Plaintiff requested a New York Court of Appeals Review of the Cap Commission's Rulings pursuant to applicable law.

On March 31, 1984, Plaintiff received a written order of removal and she vacated her office. By letter dated

April 5, 1984, Plaintiff filed a notice of motion for a stay pending disposition of Plaintiff's reargument with the Court of Appeals.

On April 28, 1984, Plaintiff filed a Notice of Motion for Reargument adn went for disqualification of a judge Jasen on ethical grounds. both motions were denied. The instant action was then commenced.

First, the Court believes that the defendants have satisfied the requirements necessary for reargument of their motion to dismiss.

Second, the Court is convinced by the defendant's argument that it lacks subject matter jurisdiction over the claim. The United States Supreme Court determined that a District Court has no power to review a decision of the highest court of a State regarding a particular lawyer's discipline.

In District of Columbia Court of Appeals v. Feldman, the Supreme Court noted that, as a general proposition, a United States District Court has no authority to review final judgments of a State Court in judicial proceedings.

Review of such judgments may be held only in the United States Supreme Court. Moreover, a person subject to disciplinary proceedings brings an action according to United States Code Section 1983 claiming that a prior State disciplinary judgment resulted in constitutional deprivation, a District Court must decline jurisdiction, if the constitutional claims are inextricably intertwined with the State Court's decision. This is because accepting jurisdiction would in essence require a Federal District Court to review the final determination of a state's highest court. The policy behind this rule

reflects the federal system's respect for the strong interest the states have in regulating the conduct of lawyers admitted to practice in their respective jurisdictions.

Without a doubt, this rule compels the court to dismiss the instant case for lack of subject matter jurisdiction. The Plaintiff's civil rights claims before this Court are firmly tied to the disciplinary proceedings which were litigated in the highest court of the New York State Judiciary. While the claims of plaintiffs before this Court are different than those asserted before the New York Judiciary, there is no question that they arise out of the same set of facts and proceedings. More important, however, is the fact that this case is on all fours with the decision the Second Circuit rendered on January 5, 1984 in Zimmerman v. Grievance Committee. The

strength of this presence is demonstrated by the fact that the United States Supreme Court denied certiorari in the case on June 4, 1984.

In the Zimmerman case, the Second Circuit affirmed a district court's denial of jurisdiction in a case where a person subject to a New York State disciplinary proceeding brought a subsequent section 1983 action in district court.

The Plaintiff in Zimmerman requested substantially the same sort of relief prayed for here. Nevertheless, following the caveat on overly intrusive judicial review outlines the bulk the Second Circuit decided that the District Court intervened despite the fact that a Section 1983 claim was filed which was facially different from the plaintiff's claim before the state court.

For the foregoing reasons, the defenndants' motion to dismiss is granted.

The Clerk of the Court is instructed to enter a notice of dismissal in this matter.

At this time I am citing an Order of Dismissal. You may get a copy from the clerk.

If you wish a copy of the Court's decision, order it from the reporter. Thank you.

[Whereupon Court recessed for the day in this matter.]

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. 84-3950

VERIFIED COMPLAINT

[CAPTION OMITTED]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Plaintiffs, complaining of the defendants, allege as follows:

I.

PARTIES

A. Plaintiffs

1. Plaintiff BARBARA M. SIMS (SIMS) is a citizen of the United States and a resident of the State of New York, and is an attorney duly licensed to practice as such in the courts of the State of New York. Judge Sims was appointed by the Mayor of the City of Buffalo, New York, the late Stanley J. Makowski, on December 27, 1977, as an interim Associate Judge of the City Court

thereof. In the general election of 1978, plaintiff, running as a candidate for a full ten-year term as an Associate Judge of the said City Court on the Democratic and Liberal Party lines, was elected over her white male opponent, who ran on the Republican and Conservative Party lines. Prior to taking office, she practiced law with her husband, former City Court Judge William Sims, in the Buffalo, New York, area. Upon information and belief, she is the only Black woman ever appointed or elected to judicial office in the State of New York, outside the City of New York.

2. Plaintiff FRANCES MURPHY is a Black Professor of Communications at the State University College at Buffalo. Currently on sabbatical leave, she is a Professor of Communications at the Howard School of Communications in Washington, D.C.

3. Plaintiff EDWARD DULSKI is a white community leader, presently Adjutant and Past Commander of AMVET's Post #7, and a retired truck driver.

4. Plaintiff LEELAND N. JONES is a Black retired Assistant Vice President of Erie Community College and a former Buffalo City Councilman.

5. Plaintiff CARLITA M. JONES is a Black teacher at the State University College at Buffalo's Campus School North.

6. Plaintiff RUTHELLEN JACOBY GRISHEN is a white Ph.D. in psychology from the University of Wisconsin.

7. Plaintiff ROBERT DAVIS is a Black former Industrial Radiation Technician at the Western Electric Corporation who was active in political and community affairs until he became disabled several years ago.

8. Plaintiff JAMES H. SCOTT is a Black Past District Grand Master of the District Grand Lodge, Grand United Order of Odd Fellows, a member of the Board of Directors of G.U.O.O.F., Past President of U.A.W. Local #1173, and a retired employee of the General Motors Corporation.

9. Plaintiff MARIA RIVERA is an Hispanic school teacher employed by the Buffalo Public School System.

10. Plaintiffs FRANCES MURPHY, EDWARD DULSKI, LEELAND N. JONES, CARLITA JONES, RUTHELLEN JACOBY GRISHEN, ROBERT DAVIS, JAMES H. SCOTT and MARIA RIVERA, the class plaintiffs, who are Black, White, and Hispanic citizens of the United States and residents of the State of New York, are all registered voters who cast their ballots for Plaintiff SIMS at the General Election of November,

1978. They sue on behalf of themselves and all others similarly situated.

B. Defendants

11. Defendants Court of Appeals Judges, HONS. LAWRENCE H. COOKE, MATTHEW J. JASEN, HUGH JONES, SOL WACHTLER, BERNARD F. MEYER, RICHARD D. SIMONS and JUDITH F. KAYE, are all citizens of the United States and residents of the State of New York,[1] and are respectively, the Chief Judge and Associate Judges of the Court of Appeals of the State of New York. They are sued in their official capacities only.

II.

CLASS ACTION ALLEGATIONS

12. Plaintiffs MURPHY, DULSKI, L. JONES, C. JONES, JACOBY GRISHEN, DAVIS, SCOTT and RIVERA, bring this

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[1]Upon information and belief, Associate Judges Wachtler and Meyer are residents of this District.

action on their own behalf and that of all other persons who voted for Plaintiff SIMS at the General Election of November, 1978, pursuant to Rule 23(a)(3) of the Federal Rules of Civil Procedure. The members of said class are so numerous as to make it wholly impracticable, if not impossible, to bring each one of them individually before this Court, but there are common questions of law and fact involved, common grievances arising out of common wrongs, and a common relief is sought for each plaintiff and for each member of the class. Plaintiffs adequately represent the interests of said class.

III.

JURISDICTION

13. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. ¶1343(3) and (4). This is an action in equity authorized by 42 U.S.C. §§1981, 1983 and

1985. The rights, privileges and immunities sought to be secured in this action are those guaranteed by the First, Fifth, Eighth, Thirteenth, Fourteenth, Fifteenth and Nineteenth Amendments to the Constitution of the United States and by 42 U.S.C. §§1981, 1983 and 1985.

IV.

STATEMENT OF FACTS

14. In the General Election of November, 1978, plaintiff SIMS, after serving an interim appointment of one year as such, was duly elected as an Associate Judge of the City Court of Buffalo, New York, a court of limited original civil and criminal jurisdiction, for a term of ten (10) years. She was sworn into office on January 1, 1979 for a full ten-year term.

15. Setting bail is a routine part of a local court judge's

responsibilities pursuant to New York C.P.L. §530.20.

16. On January 25, 1979, plaintiff SIMS released one Walter L. Jones, a person charged with a misdemeanor and arrested on a warrant, on his own recognizance after making inquiry of the Police Department. It was subsequently determined that the action upon which the warrant had been issued had been dismissed three years prior thereto.

17. On June 1, 1979, William Sims received a letter, Exhibit A, from the New York State Commission on Judicial Conduct (hereinafter referred to as "Commission"), requesting his appearance before the Commission. Upon his appearance, he was questioned about the Jones bail release and about the relationship between Jones, Plaintiff Sims (his wife), and himself.

18. Plaintiff SIMS was never advised by any of the supervising judges of any violation of any court rules or procedures.

19. The first notice from the Commission to Plaintiff SIMS of any alleged wrongdoing by her was in a letter dated August 2, 1979, Exhibit B, and was accompanied by an "Administrator's Complaint," which was dated April 2, 1979, although not served until after August 2, 1979, Exhibit C. The Complaint stated:

> It is alleged that on or about January 25, 1979, Judge Sims ordered released from bail [sic] a defendant she had once represented as an attorney and who was represented in court by her husband the following day on January 26, 1979.

It was alleged that the "Administrator's Complaint" was initiated by the receipt of a newspaper article sent anonymously to the Commission.

20. That the thrust of the charge against said plaintiff was that she had failed to disqualify herself pursuant to the Rules of the Administrative Board specifically, Rule 33(c)(4), when Patricia Jones had requested bail for her husband, on the ground that she had once represented him in a totally different proceeding, and that once released, and on the following day, he hired her husband as his attorney.

21. On September 5, 1979 William Sims, then acting as attorney for Plaintiff SIMS, wrote to the Commission inquiring as to what rule or canon the Complaint referred. Exhibit D. The Commission, in turn, in a letter dated September 6, 1979, Exhibit E, informed said attorney that his request was "premature."

22. A hearing was scheduled by the Commission in Albany, New York, on October 3, 1979, at which Plaintiff SIMS was required to appear and give testimony. As a result of such testimony, Plaintiff SIMS received a letter from the Commission dated November 26, 1979, Exhibit F, advising her that she would now be investigated about two additional incidents.

23. On or about May 2, 1980, Plaintiff SIMS received another letter from the Commission distorting the facts and shifting their emphasis by alleging that she released certain defendants who were represented by her husband at the time of their detention. Exhibit G. As a result of said investigation, another Administrator's Complaint was received by said plaintiff on or about November 10, 1980, Exhibit H. The court records clearly indicated the appearance of the

released defendants for arraignment with their attorney occurred at a later date than their release.

24. On or about February 3, 1981, the Commission served upon said plaintiff a notice of Formal Written Complaint and a Formal Written Complaint, dated February 2, 1981, pursuant to §44(4) of the Judiciary Law of the State of New Yorк, Exhibit I. The said Formal Written Complaint contained eleven (11) counts of alleged "misconduct."

25. In summary, these charges were as follows:

> Charge I - Plaintiff had signed an arrest warrant in a case in which her son was the complaining witness, Exhibit 7 at Count I, See Greissman v. Fisher, 252 N.Y. 580, Ibid, at Charge I;
>
> Charges II-XI - Plaintiff had signed ten (1) bail release orders in criminal cases in which her husband subsequently represented the named defendants.

> Ibid, at Charges II through XI.

The charges now shifted so as to read:

> Respondent knew or should have known at the time she signed the order that her husband, William Sims, represented the defendant in this proceeding.

26. On March 13, 1981, plaintiff SIMS served her verified Answer to the aforesaid charges, Exhibit J, in which she denied that the acts enjoined upon her by law could be construed as her misconduct as they appeared in the written Complaint, and, in addition, raised six (6) affirmative defenses thereto, as follows:

> (a) that the Commission was illegally and unconstitutionally established, Exhibit J at ¶8;
>
> (b) that in 'prosecuting' petitioner, the Commission violated petitioner's civil rights, Ibid., at ¶10;

(c) that bail applications are not proceedings or controversies within the meaning of Judiciary Law Section 14 and that petitioner is required by law to entertain all such applications, Ibid. at ¶¶12, 13;

(d) that petitioner's conduct as alleged in the Formal Written Complaint did not violate ethical standards and was in accordance with the directives of petitioner's administrative superiors, Ibid. at ¶¶15, 16;

(e) that the Commission lacked standing to raise the issue of petitioner's alleged failure to disqualify herself, Ibid. at ¶¶18, 19;

(f) that the Commission's investigation of petitioner was improper, unlawful and intended to harass and annoy petitioner. Ibid. at ¶¶22-28.

27. On April 30, 1981, Sheila Birnbaum, Esq. was appointed by the Commission as a Referee to hear and report thereto with respect to the

aforesaid charges against Plaintiff SIMS. Exhibit K.

28. On June 12, 1981, the Commission moved to disqualify said plaintiff's husband from representing her before it on the grounds that he would be called as a witness at the aforesaid hearing. Exhibit L. When plaintiff SIMS opposed said motion on the ground that the Commission as an agency had no jurisdiction to hear and determine the motion, Exhibit M, it was withdrawn by Commission's counsel on February 9, 1982.

29. On or about February 26, 1982, Plaintiff SIMS moved for summary judgment on the ground that the conduct designated as misconduct by the Commission not only was not improper, but was in accordance with identical conduct of all of the white judges in New York State. Exhibit N. By Order dated March 25, 1982, the Commission denied said

motion. Exhibit O. In said motion, several questions of law were raised even though the Referee had no jurisdiction to hear and decide them since her authority stemmed from the Commission.

30. An evidentiary hearing took place on March 1, 1982, at which Commission's counsel called two witnesses, namely, Hon. H. Buswell Roberts, Chief Judge of the City Court of Buffalo, New York, and William Sims, and introduced 26 exhibits into evidence. Plaintiff SIMS testified on her own behalf and introduced five exhibits into evidence, one of which the Referee refused to admit.

31. On October 5, 1982, the Referee filed her Report with the Commission. Exhibit P. In essence, she found that Charges II through XI had been established by the credible evidence, but dismissed Charge I as unproved. In her

Findings, the Referee concluded that Judge SIMS should have known that her release of the criminal defendants would lead to William Sim's representation of them in their court appearance.[2] See, Conclusions 13 in Charge III; 7 in Charge IV; 8 in Charge VI; 10 in Charge VIII; 7 in Charge IX; 8 in Charge X; 9 in Charge XI; see also, Conclusion 1 in Charges III, IV, VI and XI.

32. On November 24, 1982, Commission's counsel moved to confirm the said Referee's report as to Charges II through XI, to disaffirm the said Report as to Charge I, and to render a determination that plaintiff be censured. Plaintiff SIMS' opposing papers, Exhibit Q, were filed on December 31, 1982, and the Commission's Reply thereto on or

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[2]Judge SIMS had released more than 6,000 defend
of whom had hired her husband, during her judicial c

about the same date. Oral argument thereon, pursuant to 22 NYCRR §7000.7(a) of the Commission's Operating Procedures and Rules was heard by the Commission on March 24, 1983.

33. On May 16, 1983, the Commission dismissed Charge I and held that Charges II through XI had been established and that Plaintiff SIMS should be censured. Exhibit R. There was one dissent to the dismissal of Charge I, Exhibit S, and one Commission member voted to dismiss Charges II through IX, and dissented as to the sanction, voting that said plaintiff be admonished. Exhibit T. Four Commission members absented themselves from taking part.

34. On June 10, 1983, Plaintiff SIMS requested review by the judicial defendants, sitting as a court, of the Commission's determination, and on July 20, 1983, moved before said

defendants to expand the Record of the proceedings to include various investigative materials. By Order dated September 7, 1983, said motion was granted as to all but one of the proposed inclusions.

35. On March 29, 1984, said judicial defendants, sitting as a court, found that all of the eleven charges against Plaintiff SIMS had been established, rejected the Commission's sanction of censure, and imposed that of removal against said plaintiff. Exhibit U.

36. On or about April 28, 1984, Plaintiff SIMS moved before said judicial defendants, sitting as a court, for reargument, which said motion was denied thereby on June 7, 1984.

37. The Commission was created by a Constitutional Amendment, Article VII, §22, Constitution of the State of

New York, effective April 1, 1978. Its eleven members, comprised of lay citizens, judges and lawyers, are appointed as follows: four by the Governor; three by the Chief Judge of the Court of Appeals; and one each by the four majority and minority leaders of the State Legislature. Its determinations are reviewable by the Court of Appeals. Prior to 1980, disciplinary sanctions of the Temporary Commission on Judicial Conduct (Former Commission) were reviewed either by the appropriate Appellate Division or Court on the Judiciary (now abolished).

38. Since January of 1975, the Temporary, Former, and present Commission have considered 6,145 complaints of judicial misconduct, of which 4,123 were dismissed upon initial review thereby. Of the remaining 2,022 complaints, 854 were dismissed without action after

investigation, 384 were dismissed "with caution" or suggestions or recommendations to the respondent judges, 139 cases were closed following the resignations of the respondent judges, 119 cases were closed upon the vacancies of the offices of the respondent judges other than by resignation, and 371 cases resulted in disciplinary actions of some sort.

39. The results of the said 371 disciplinary actions were as follows:

(a) forty-six (46) respondent judges were removed from office;

(b) three (3) were suspended without pay for six (6) months; and

(c) two (2) were suspended without pay for four (4) months;

(d) one-hundred-thirty-four (134) were publicly censured; and

(e) fifty-nine (59) were publicly admonished and a like number admonished confidentially.

40. From 1980, when the Court of Appeals was granted appellate jurisdiction over the Commission's determinations, until March of 1984, only twenty-three (23) petitions for review have been decided by that tribunal. In sixteen (16) of the cases, the Court confirmed the Commission's determinations, while in six (6) it reduced the sanctions imposed thereby. On only two (2) occasions, has it ever increased the sanctions imposed by the Commission, namely, In the Matter of Shilling, 51 N.Y. 21d 397, 434 N.Y.S. 2d 909, 415 N.E. 2d 900 (1980), and in Plaintiffs SIMS' case.

41. In Shilling, the Commission had imposed censure upon a judge of the Civil Court of Kings County who, as trustee of an unlicensed animal shelter, had, inter alia, intimidated and verbally abused licensing officials of

the Department of Health of the City of New York, attempted to have summonses issued to the shelter dropped, interferred in proceedings before another judge involving the said department, and engaged in hostile altercations with an ASPCA attorney in a courthouse corridor.

42. In stark contrast to the situation involving Judge SIMS where there was no such misconduct, Judge Shillings' actions involved blatant misconduct off the bench in which he, among other things, attempted to use his official office to gain special consideration in actions pending against him and to intimidate public officials into violating the law by failing to perform their assigned duties.

43. The six cases in which the Court reduced the penalties imposed by the Commission are as follows:

(a) Matter of Cunningham, 57 N.Y. 2d 270, 456 N.Y.S. 2d 36, 442 N.E. 2d 34 (1982), involved an Onondaga County Judge who improperly advised a lower court judge that the latter's decisions would not be reversed on appeals over which respondent might preside. The Court reduced the sanction of removal to censure.

(b) Matter of Kelso, 61 N.Y. 2d 82, 471 N.Y.S. 2d 839, 459 N.E. 2d 1276 (1984), involved an Orange County Justice of the Peace who deliberately deceived one of his clients in his private law practice and, upon learning that the said client intended to file a grievance against him, offered a $10,000 bribe to him not to do so. The Court reduced the sanction of removal to public censure.

(c) Matter of Quinn, 54 N.Y. 2d 386, 446 N.Y.S. 2d 3, 430 N.E. 2d

879 (1981), involved an Albany County Supreme Court Justice, a habitual drunkard, who, following one of his many arrests for driving while intoxicated, urinated upon a police car, offered to bribe the arresting officers and insinuated that he would revenge himself upon them. The Court reduced the sanction of removal, after the respondent's resignation, to censure.

(d) Matter of Rogers, 51 N.Y. 2d 224, 433 N.Y.S. 2d 1001, 414 N.E. 2d 382 (1980), involved a Madison County Town Justice who failed to report and remit funds received by him in his judicial capacity to the State Comptroller and did not cooperate with the Commissions' investigation. The Court reduced the sanction of removal to censure.

(e) Lonschein v. State Commission on Judicial Conduct, 50 N.Y.

2d 569, 430 N.Y.S. 2d 571, 408 N.E. 2d 901 (1980), involved a Queens County Civil Court Judge who sought special consideration from the Taxi and Limousine Commission for a friend. The Court reduced the sanction of censure to admonition.

(f) Matter of Dixon, 47 N.Y. 2d 523, 419 N.Y.S. 2d 445, 393 N.E. 2d 441 (1979), involved a Columbia County Town Court Justice who appealed to two other judges for favorable considerations on behalf of several traffic case defendants. The Court reduced the sanction of censure to admonition.

V.

CAUSES OF ACTION

FOR A FIRST CAUSE OF ACTION:
DENIAL OF EQUAL PROTECTION

44. The drastic increase in the severity of the sanction imposed upon Plaintiff SIMS by the judicial defendants over that imposed by the Commission, both

in relation to the misconduct attributed to her and in comparison to the treatment afforded other subject judges, has denied her the equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

45. Furthermore, in view of the fact that Plaintiff SIMS is a Black woman, the grossly disparate treatment afforded her by the judicial defendants, all members of the white race, has raised the appearance of racism on the part thereof, is constitutionally suspect, all in violation of the Thirteenth and Fourteenth Amendments to the Constitution of the United States.

FOR A SECOND CAUSE OF ACTION: THE COURT OF APPEALS LACKED JURISDICTION TO REVIEW A LEGAL RULING OF AN ELECTED JUDGE

46. The review of a judge's ruling on disqualification may not be made by the Commission or by the Court of Appeals. If the Commission is a party to

the action, the issue may be raised by it by motion; or if the Court of Appeals is party to the action it may raise the issue by motion, etc.; or the issue may be reviewed by the Court of Appeals if a party to the action appeals the issue of disqualification to the Court.

47. In the case at bar, the Commission was not a party to the action and therefore the Court of Appeals lacked the jurisdiction to consider the issue of disqualification raised by the Commission. None of the parties to the cases upon which Judge SIMS was disciplined, raised the issue of disqualification by either motion or by appeal. There were no motions and no appeals. By being prosecuted when the Commission and the Court of Appeals lacked jurisdiction over the subject matter, Plaintiff SIMS was denied due process of law as guaranteed by the Fifth

and Fourteenth Amendments to the

Constitution of the United States.

FOR A THIRD CAUSE OF ACTION:
DENIAL OF DUE PROCESS OF LAW

48. Plaintiff SIMS was denied due process of law

as guaranteed by the Fifth and Fourteenth Amendments to the

Constitution of the United States by the following acts:

a. by being prosecuted without probable cause upon an investigation that was initiated by a newspaper article;

b. by being prosecuted through investigation without having been served a clear statement of the charges against her;

c. by being denied a clarification on the charges pending against her after the prosecution had begun and subsequent to a request for a clarification of the charges;

d. by being prosecuted upon a charge (the Walter Jones charge) when the prosecuting agency knew that the charge was without legal merit;

e. by being prosecuted upon the remaining charges when the prosecuting agency knew they lacked legal merit;

f. by being prosecuted with the use of knowingly tampered evidence;

g. by the charges against her being instigated by a "fishing expedition" without scope or limitation, and without a statement of the charges;

h. by being denied a forum before which she could raise legal defenses to the prosecution against her;

i. by being denied guidelines of proscribed conduct prosepectively, or upon her request;

j. by not being furnished by statute or rules the exact penalty or penalties which would result from defined acts of misconduct;

k. by not being provided with the results of an investigative report made by the Commission (of one of the defendants released on bail by Plaintiff SIMS) as exculpatory material to Plaintiff SIMS;

l. by being prosecuted for acts which could have been disproven by a full investigation;

m. by the reliance on facts not in the record to substantiate removal in violation of well-established law;

n. by providing a forum for a review of the determination of the Commission which was in fact illusory;

o. by increasing the penalty against plaintiff SIMS without providing for a right to appeal or a forum to present a defense against the imposition of an increased penalty;

p. by prosecuting plaintiff SIMS for performing judicial acts which she was legally obligated to do;

q. by selectively prosecuting Plaintiff SIMS for releasing defendants on bail after court hours according to well-established procedures and local custom;

r. by sanctioning all of the above omissions of the Commission by failing to

pass upon them and not dealing with prosecutorial misconduct which vitiates a proceeding.

FOR A FOURTH CAUSE OF ACTION: PLAINTIFF SIMS WAS PROSECUTED IN CONTRAVENTION OF HER RIGHT TO BE PROTECTED FROM THE APPLICATION OF AN EX-POST FACTO LAW AND A BILL OF ATTAINDER

49. Defendant COURT OF APPEALS JUDGES prosecuted and removed Plaintiff SIMS as a Judge of the City Court of the City of Buffalo, New York, for violating an unpromulgated rule which purportedly bars a judge from (1) determining bail for a defendant who was previously represented by said judge in an unrelated matter; (2) determining bail for a party who may subsequently decide to be represented by an attorney-relative of the judge and who the judge "knew or should have known" at the time of the determination of bail that such a defendant might retain said attorney-relative; and (3) signing a

warrant of arrest on which the complaining witness is a relative of the judge, all in violation of the Constitution of the United States, Article I, Section 6. No rules or regulations have previously been promulgated which prohibit any of the conduct by any judge, nor has any other judge ever been disciplined for like or similar conduct. Accordingly, Plaintiff SIMS had no notice that such conduct on her part was proscribed and the prosecution thereof constitutes a violation of her right to be free from ex-post facto laws. In addition, since the rule was applied only against her, it constitutes a bill of attainder and is, therefore, in violation of the Constitution of the United States, Article I, Section 10.

FOR A FIFTH CAUSE OF ACTION: PLAINTIFF SIMS WAS REMOVED FROM OFFICE IN VIOLATION OF HER RIGHTS UNDER THE SIXTH AMENDMENT TO THE

CONSTITUTION OF THE UNITED STATES TO FACE HER ACCUSERS

50. In the entire course of the disciplinary proceedings against Plaintiff SIMS, she was never afforded any opportunity to face any accuser as is guaranteed to her by the Sixth Amendment to the Constitution of the United States. In the investigation, hearing and other proceedings before the Commission only three witnesses appeared, none of whom could possibly be regarded as her accusers. Even if the Commission accused her of releasing ten defendants on bail who, at the time of their release, were represented by her husband, no witness appeared to testify as to these allegations or to be cross-examined thereon, and no witnesses appeared before the defendant JUDGES OF THE COURT OF APPEALS although new facts were found which were not in the record.

FOR A FIRST CAUSE OF ACTION FOR

CLASS ACTION PLAINTIFFS and SIXTH CAUSE OF ACTION FOR PLAINTIFF SIMS: PLAINTIFFS ARE DISENFRANCHISED BY THE REMOVAL OF PLAINTIFF SIMS FROM ELECTIVE OFFICE

51. The aforesaid actions of the judicial defendants have deprived and will continue to deprive all plaintiffs and the classes which they, or some of them, represent, or rights, privileges and immunities guaranteed to them by the Constitution and laws of the United States including but not limited to, the Thirteenth, Fourteenth, and Fifteenth Amendments to said Constitution, as they relate to due process and the equal protection of the laws, the right to be free from the badges and indicia of slavery and the right to an effective and undiluted vote for the candidates of their choice.

52. The unwarranted removal of Plaintiff SIMS has deprived them and will continue to deprive them of the services

of a judge for whom they duly voted at the General Election of 1978, thus nullifying and abrogating, not only their ballots, but their right to duly elected public officials of their choice, all in violation of the Fourteenth and Fifteenth Amendments to the Constitution of the United States.

FOR A SECOND CAUSE OF ACTION FOR CLASS ACTION PLAINTIFFS AND A SEVENTH CAUSE OF ACTION FOR PLAINTIFF SIMS: PLAINTIFFS HAVE SUFFERED IRREPARABLE INJURY AND WILL CONTINUE TO SUFFER IRREPARABLE INJURY BY THE REMOVAL OF JUDGE SIMS FROM THE BENCH.

53. By virtue and in consequence of the aforesaid actions of the judicial defendants, plaintiffs and the members of the classes which some of them represent have been and will continue to be irreparably prevented from exercising their rights to due process and the equal protection of the laws and/or to the full and effective utilization of their right to exercise

their elective franchise, as guaranteed to them by the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States, as well as those entitling them or some of them, to protection from the imposition of the badges and indicia of slavery as provided in the Fourteenth and Fifteenth Amendments to said Constitution.

VI.

REMEDIES

WHEREFORE, Plaintiffs request judgment as follows:

A. A preliminary and permanent injunction directing the judicial defendants to rescind and vacate their order of March 29, 1984, removing plaintiff SIMS from the position of Associate Judge of the City Court of Buffalo, New York; restoring her to her elective position and directing that she be paid back pay and fringe benefits;

B. A declaratory judgment declaring that it was constitutionally impermissible for the said judicial defendants to remove Plaintiff SIMS from her said position;

C. An award of reasonable attorney's fees, costs and disbursements incurred in connection with the institutiocn and maintenances of this action;

D. Granting an Order that this cause be advanced on the calendar so that full proof of the allegations of discrimination on the basis of race, sex and marital status alleged in this Complaint can be heard and determined; and

E. Such other and further relief as may be just and proper.

Dated: New York, N.Y.
September 19, 1984

Respectfully submitted,

Dated: New York, N.Y.
September 19, 1984

Respectfully submitted,

WILLIAM M. KUNSTLER
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APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

PRESENT: HON. HENRY BRAMWELL

ORDER TO SHOW CAUSE

Civ. Act. No. CV-84-3950

[CAPTION OMITTED]

Upon verified complaint, the Affidavit of Barbara M. Sims, sworn to the 16th day of August, 1984; the Affidavits of Rozanne Jackson and Emory Jackson, Sr., both sworn to the 31st day of August, 1984; the Affidavit of Benjamin Rivera, sworn to the 9th day of August, 1984; the Affidavits of Walter L. Jones and Patricia Jones, both sworn to the 29th day of August, 1984; the Affidavit of Lawrence Grant, sworn to the 10th day of August, 1984; the Affidavit of James Grant, sworn to the 27th day of August, 1984; the Affidavit of Reginald Williams, sworn to the 27th day of August, 1984; the Affidavit of Duane

Williams, sworn to the 10th day of August, 1984; and the Certificate of William M. Kunstler, attorney for plaintiff, Barbara M. Sims, all hereto attached, it is

ORDERED that the defendants show cause before this Court on the 22nd day of October, 1984, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why a preliminary injunction should not issue enjoining the defendants Erie Coiunty Board of Elections from proceeding to fill the position of Associate Judge of the City Court of Buffalo, pending the determination of this action, and further enjoining the defendants, Hons. Lawrence H. Cooks, as Chief Judge, and Matthew J. Jasen, Hugh Jones, Sol Wachtler, Bernard F. Meyer, Richard D. Simons and Judith F. Kaye, as Associate Judges of the Court of Appeals of the State of New York,

mandatorily and directing the said judicial defendants to rescind and vacate their Order of March 29, 1984, which removed plaintiff Sims from the position of Associate Judge of the City Court of Buffalo and to restore her to her elected position with full back pay and fringe benefits; and it is further

ORDERED that service of a copy of this Order to Show Cause, together with a copy of the papers hereto attached on the defendants on or before October 12, 1984 at 5:00 p.m. be deemed sufficient service.

Issued at Brooklyn, N.Y.
October 10, 1984, 3:22 p.m.

HENRY BRAMWELL
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Civ. No. 84-3950

NOTICE OF CROSS MOTION

[caption omitted]

PLEASE TAKE NOTICE that, upon the annexed affidavit of JEFFREY I. SLONIM, sworn to October 18, 1984, and all of the prior proceedings heretofore had herein, the undersigned will cross-move this Court, at the return of plaintiffs' motion brought on by Order to Show Cause dated October 10, 1984, presently scheduled to be heard on October 22, 1984, at 10:00 a.m. in the forencon or as soon thereafter as counsel may be heard, at the Courthouse, 225 Cadman Plaza East, Brooklyn, New York, for an order pursuant to Rule 12(b)(1) and (3), Fed. R. Civ. P., dismissing this action against

defendants COOKE, JASEN, JONES, WACHTLER, MEYER, SIMONS and KAYE, on the grounds that the Court lacks jurisdiction over the subject matter and this case was improperly placed in the Eastern District of New York, and for such other and further relief as the Courts shall find necessary and proper in the circumstances.

Dated: New York, N.Y.
October 16, 1984

ROBERT ABRAMS
Attorney General of the State
of New York
Attorney for Judicial
Defendants
by:

_____

JEFFREY I. SLONIM
Ass't. Attorney General
Two World Trade Center
New York, NY 10047
(212) 488-2753

TO:

WILLIAM M. KUNSTLER
BETTY LAWRENCE BAILEY
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APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 84-3950

NOTICE OF MOTION

[caption omitted]

PLEASE TAKE NOTICE that, upon the Decision and Order of this Court dated October 24, 1984, and all of the prior proceedings heretofore had herein, the undersigned will move this Court on November 16, 1984, at 10:00 a.m. in the forenoon or as soon thereafter as counsel may be heard, at the Courthouse, 225 Cadman Plaza East, Brooklyn, New York, for an order (a) pursuant to Civil Rule 3(j) of the Rules of this Court, granting reargument of the Decision and Order and, upon such reargument, dismissing the complaint against the judicial defendants because the Court lacks jurisdiction of the subject matter of this action, on the ground that the Court overlooked matters

and controlling decisions in issuing that Decision and Order; or, in the alternative, (b) pursuant to Rule 60(b), Fed. R. Civ. P., and Rule 5(a), Fed. R. App. P., amending the Decision and Order to add thereto a certification pursuant to 28 U.S.C. §1292(b) that the Order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate determination of the litigation; and for such other, further or different relief as the Court shall find just and proper in the circumstances.

Dated: New York, NY
November 5, 1984

Yours, etc.,

ROBERT ABRAMS
Attorney General of the State
of New York
Attorney for Judicial
Defendants

by:

_____

JEFFREY I. SLONIM
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Two World Trade Center
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TO:

WILLIAM M. KUNSTLER
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Attorneys for Plaintiffs

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Ass't County Attorney

Attorney for Board of Elections
Defendants

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 84-3950

ANSWER

[CAPTION OMITTED]

Defendants CHIEF JUDGE COOKE and ASSOCIATE JUDGES JASEN, JONES, WACHTLER, MEYER, SIMONS and KAYE, by their Attorney, Robert Abrams, Attorney General of the State of New York, as and for their answer to the complaint against them:

1. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 1 through 10, inclusive, except refer to Matter of Sims, 61 N.Y. 2d 349, 474 N.Y.S. 2d 270 (1984), for the contents thereof.

2. Admit the allegations contained in paragraph 11.

3. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 12.

4. Deny each and every allegation contained in paragraph 13 except admit that plaintiff purports to bring this this action as a class action.

5. Deny each and every allegation contained in paragraph 14 and refer to the authorities cited for the contents thereof.

6. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 15, except refer to Matter of Sims, supra, for the contents thereof.

7. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 16, except refer to New York C.P.L. §530.20 for the contents thereof.

8. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 17 through 34, inclusive, except refer to the record of the proceedings before the Commission on Judicial Conduct for the contents thereof.

9. Admit the allegations contained in paragraph 35, and refer to the record of the proceedings before the Court of Appeals for the contents thereof.

10. Deny each and every allegation contained in paragraph 36, except admit that the judicial defendants issued an opinion dated March 29, 1984, and refer thereto for the contents thereof, and further specifically admit the allegation that that opinion was issued by the judicial defendants "sitting as a court."

11. Admit the allegations contained in paragraph 37, and refer to the record

of the proceedings before the Court of Appeals for the contents thereof.

12. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 38.

13. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 39, except refer to Article VI, §22 of the Constitution of the State of New York for the contents thereof; admit that that section was effective April 1, 1978; and refer to prior law for the contents thereof.

14. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 40 and 41.

15. Deny each and every allegation contained in paragraph 42, except admit that, from 1979, when the Court of

Appeals was granted appellate jurisdiction over the Commission's determinations, until the determination in the present matter, twenty-three petitions for review were declined on the merits by the Court of Appeals; admit that in sixteen of those cases, the Court confirmed the Commission's determinations, while in six it reduced the sanction imposed by the Commission; and admit that on only two occasions has the Court of Appeals increased the sanction imposed by the Commission, those two cases being Matter of Schilling, 51 N.Y.2d 397, 434 N.Y.S. 2d 909, 415 N.E.2d 900 (1980), and plaintiff SIMS' proceeding.

16. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 43, except refer to the record before the Court of Appeals, and to the

Court's decision, in Schilling for the contents thereof.

17. Deny each and every allegation contained in paragraph 44, except refer to the record before the Court of Appeals, and the Court's decision, in Schilling for the contents thereof.

18. Deny each and every allegation contained in paragraph 45, except refer to the cited decisions for the contents thereof, and admit that there are six such cases.

IN ANSWER TO THE FIRST PURPORTED CAUSE OF ACTION:

19. Deny each and every allegation contained in paragraphs 46 and 47.

IN ANSWER TO THE SECOND PURPORTED CAUSE OF ACTION:

20. Deny each and every allegation contained in the first sentence of paragraph 48 and, while admitting the accuracy of the propositions of law contained in the second sentence of that

paragraph, deny the intended implication that the Court of Appeals lacked jurisdiction to review the determination of the Commission on Judicial Conduct.

21. Deny each and every allegation contained in paragraph 49, except deny knowledge or information sufficient to form a belief as to the truth of the allegations that "[n]one of the parties to the cases upon which Judge SIMS was disciplined, raised the issue of disqualification by either motion or by appeal" and "[t]here were no motions and no appeals;" and deny the relevance to this action of each of those allegations even if true.

IN ANSWER TO THE THIRD
PURPORTED CAUSE OF ACTION:

22. Deny each and every allegation contained in paragraph 50 and further deny the premise of that paragraph that plaintiff SIMS was prosecuted by the Court of Appeals or the judges thereof.

IN ANSWER TO THE FOURTH
PURPORTED CAUSE OF ACTION:

23. Deny each and every allegation contained in paragraph 51.

IN ANSWER TO THE FIFTH
PURPORTED CAUSE OF ACTION:

24. Upon information and belief, deny each and every allegation contained in paragraph 52 and refer to the record of the proceedings before the Commission, as brought by plaintiff SIMS to the Court of Appeals for review, for the contents thereof; admit the allegation that "no witnesses appeared before the defendant JUDGES OF THE COURT OF APPEALS," and further admit that no witnesses appeared before the Court of Appeals; and deny the allegation that "new facts were found which were not in the record;" and refer to the record, and to the decision of the Court of Appeals in Matter of Sims, supra, for the contents thereof.

IN ANSWER TO THE FIRST PURPORTED
CAUSE OF ACTION FOR "CLASS ACTION

PLAINTIFFS" AND THE SIXTH PURPORTED CAUSE OF ACTION FOR PLAINTIFF SIMS

25. Deny each and every allegation contained in paragraph 53 and 54.

IN ANSWER TO THE SECOND PURPORTED CAUSE OF ACTION FOR "CLASS ACTION PLAINTIFFS" AND THE SEVENTH PURPORTED CAUSE OF ACTION FOR PLAINTIFF SIMS

26. Deny each and every allegation contained in paragraph 55.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE:

The Court lacks jurisdiction over the subject matter of the action.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE:

The action is barred by collateral estoppel.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE:

The complaint fails to state a claim upon which relief could be granted against any of the defendant Judges of the Court of Appeals.

WHEREFORE, the defendants Judges of the New York Court of Appeals respectfully demand judgment dismissing the complaint against them.

Dated: New York, NY
November 5, 1984

ROBERT ABRAMS
Attorney General of the State
of New York
Attorney for Judicial
Defendants
by:

_____
JEFFREY I. SLONIM
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Attorney for Board of Elections
Defendants

APPENDIX I

Transcript of Proceedings before Hon. Henry Bramwell, U.S.D.J. November 23, 1984, 10:00 a.m.

Let's assume the seven judges of the Court of Appeals said about this black woman judge, we are going to remove her because she's black. Let's assume that is what went on. I am not saying it did, let's assume it did. You could hardly say there would not be a cause of action under 1983, because the argument is not that you are reviewing a decision, you could tell nothing from the decision or about discovery. What can you tell, what would a petition for certiorari do? There would be nothing for the Supreme Court to unravel.

* * *

. . . And I will take his hypothetical, if one or more judges in the Court of Appeals had written a piece of paper or said it orally that they would set up a sanction on Judge Sims because whether she was black, very definitely a 1983 action would apply against that judge personally.

Before we brought that action, we would bring a proceeding to remove those judges for that kind of gross misconduct. And, incidentally, the Commission on Judicial Conduct, a fairly recent thing, is a successor to action by the legislature in removing the judges, higher court judges, lower court judges. Your Honor recalls from your State Court days, would be before the Appellate Division in which the legislature by the form of removal or by impeachment and removal. Remember they had the two procedures, judges could be disciplined

and removed. It happens so rarely, even thcugh there were many causes that constnatly there was a struggle for improvement. We have improvement now. Let's come back to that question.

Let's assume that judges did that, by gosh the remedy is definitely 1983. Not only that they should have to pay damages under 1983 by their acts, they would have irreparably injured Judge Sims. Because legally there was no way for her to be put back in the judicial position she had after the Court of Appeals had acted unless she went to the Supreme Court on a certiorari. Again, we are confusing one thing with the other and I repeat again and again that we are not seeking action here, the plaintiffs let's say against the Court of Appeals, is a straight and outright possibility, and incredibility because there is nothing here.

No. 85-203

Supreme Court, U.S.
FILED
SEP 6 1985
CLERK

IN THE

Supreme Court of the United States

October Term, 1985

BARBARA M. SIMS,

Petitioner,

against

HONS. LAWRENCE H. COOKE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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Of Counsel

BEST AVAILABLE COPY

Question Presented

Did the district court have subject matter jurisdiction over an action brought solely to overturn a decision of the highest court of a state to sustain disciplinary charges against a judge and to remove her from the bench?

Parties

Barbara M. Sims is the only petitioner. Her petition identified as respondents the Honorables Lawrence H. Cooke, Matthew J. Jasen, Hugh R. Jones, Sol Wachtler, Bernard S. Meyer, Richard D. Simons and Judith S. Kaye. At the time the action was commenced in the district court, Judge Cooke was chief judge of the New York Court of Appeals and Judges Jasen, Jones, Wachtler, Meyer, Simons and Kaye were the associate judges.

After the notice of appeal to the Second Circuit was filed, Chief Judge Cooke and Judge Jones retired. Associate Judge Sol Wachtler was appointed Chief Judge and Fritz W. Alexander, II, was appointed Associate Judge effective January 1, 1985. Because the judicial defendants were sued in their official capacities only (Complaint ¶ 11, Appendix 22a), Chief Judge Wachtler and Judge Alexander were automatically substituted as defendants-appellees in the Second Circuit pursuant to Rule 43(c)(1), Fed. R. App. P. The Second Circuit's decision did not reflect the substitution. Thereafter, Vito J. Titone was appointed to the remaining vacancy as associate judge.

Because respondents had been sued only in their official capacities, the current members of the New York Court of Appeals were therefore automatically substituted for their predecessors pursuant to Rule 40.3 of the Rules of this Court. The petition is thus mistaken in listing as respondents (Petition at 1) the former members of the court.

Finally, while the petition states that the action is moot against the Commissioners of the Board of Elections of Erie County, New York (Petition at 1 n.1), who were defendants in the district court, the action has never been terminated as to them.

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No. 85-203

IN THE

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BARBARA M. SIMS,

Petitioner,

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the Second Circuit is reprinted at pages 1a to 3a of petitioner's Appendix. The decision and order of the district court denying petitioner's motion for a preliminary injunction and denying respondents' cross-motion to dismiss the complaint is reprinted at pages 4a to 9a. The opinion of the district court granting respondents' motion for reargument and dismissing the complaint, delivered

orally from the bench, is reproduced at pages 10a to 17a. No opinion in this case has been reported.

The determination of the New York Court of Appeals, which petitioner sought to have the district court review, is reported at 61 N.Y.2d 349, 474 N.Y.S.2d 270, 462 N.E.2d 370, *rearg. denied*, 62 N.Y.2d 943, 479 N.Y.S.2d 1028, 468 N.E.2d 56 (1984).

Jurisdiction

The decision of the Second Circuit was rendered on May 7, 1985, and no rehearing was sought. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254, presumably under subsection (1) thereof.

Statutory Provision

Section 1257, 28 U.S.C., provides as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in

question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

Statement of the Case

Petitioner was an Associate Judge of the City Court of Buffalo, New York (Appendix 18a-19a).* In 1979, the New York State Commission on Judicial Conduct commenced an investigation into certain allegations of improper conduct made against petitioner (28a) and eventually issued a formal written complaint charging her with eleven separate

* In reproducing her complaint in the appendix to the petition, petitioner has deleted three paragraphs relating to the process by which petitioner's vacant judicial seat was to be filled. The remaining paragraphs of the complaint were renumbered to obscure the omissions.

Paragraph 12 of the original complaint identified the Commissioners of the Erie County Board of Elections, who were also defendants below. Original paragraph 38, between the paragraphs now numbered 36 and 37, alleged that the mayor of Buffalo appointed an interim associate judge of the city court, after petitioner's removal, to serve until the next general election. And original paragraph A of the Remedies section of the complaint sought a preliminary and permanent injunction against "Defendant Board of Elections" from holding any election or filling the judicial seat formerly occupied by petitioner until the final determination of this action.

Because petitioner's omissions from the complaint in her appendix here are immaterial at this stage, references herein to the complaint refer to the version contained in petitioner's appendix rather than to the original.

acts of judicial misconduct (29a).* After a full evidentiary hearing at which petitioner testified and presented evidence on her own behalf (33a), the appointed referee found that ten of the charges against petitioner were established by the evidence and that the eleventh was not (33a). The Commission on Judicial Conduct thereafter determined, as had the referee, that ten of the charges against petitioner had been proven and her misconduct established (35a). The Commission censured petitioner for her misconduct (*id.*).

Petitioner then sought review of the Commission's determination by the New York Court of Appeals, "sitting as a court" (35a). Upon its review of the record, the Court of Appeals, "sitting as a court" (36a), found that all eleven charges of misconduct against petitioner had been supported by the evidence (*id.*). 61 N.Y.2d 349, 474 N.Y.S.2d 270, 462 N.E.2d 370, *rearg. denied*, 62 N.Y.2d 943, 479 N.Y.S. 2d 1028, 468 N.E.2d 56 (1984). In evaluating Judge Sims' conduct, the New York Court of Appeals, in its opinion, wrote of the recurring representation by her lawyer-husband of defendants who had appeared before her:

> "The unmistakable impression to be gathered from this conduct was that petitioner and her husband were acting as a team, that because of the Judge's prior as-

* The Commission on Judicial Conduct was created by N.Y. Const. art. VI, § 22, ¶ a. to "receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform or performance of official duties of any judge or justice of the unified court system." Review of a determination of the Commission may be had only in the New York Court of Appeals, *id.*, which is required to review the Commission's findings of fact and conclusions of law on the record of the proceedings upon which the Commission's determination was based. *Id.* ¶ d. The Court of Appeals may impose a less or more severe sanction than the one determined by the Commission. *Id.* See N.Y. Judiciary Law §§ 41, 44 subds. 7, 9.

> sociation with some of the defendants and because of her husband's relationship to her, special favor and consideration could be obtained in the courts through retention of the Judge's husband." (61 N.Y.2d at 355).

The Court of Appeals rejected the Commission's determined sanction of censure and directed that petitioner be removed from the bench (36a).

Petitioner never sought review in this Court, by writ of certiorari, of the decision and final order of the Court of Appeals. Instead, together with several voters who had voted for her election as a judge (21a), she commenced this action under the Civil Rights Act, 42 U.S.C. §§ 1981, 1983 and 1985 (23a-24a). They invoked federal jurisdiction pursuant to 28 U.S.C. § 1343(3) and (4) (23a).

By this action, petitioner sought, *inter alia*, a preliminary and permanent injunction directing respondents to "rescind and vacate" (54a) the order of the New York Court of Appeals which removed her from her judicial post and directing them to restore her to her judgeship with back pay and benefits (*id.*). Petitioner also sought a corresponding judgment declaring that it was "constitutionally impermissible" (55a) for respondents to remove her, as well as an award of attorney's fees. Petitioner sought no other relief against respondents.

Petitioner moved for a preliminary injunction which sought to enjoin respondents "mandatorily" to "rescind and vacate" (58a-59a) the final order of the Court of Appeals which had removed her from her judicial position and to restore her to that position with full back benefits (59a). Respondents opposed the motion and cross-moved to dis-

miss the complaint, asserting that the district court lacked subject matter jurisdiction (60a). The district court denied the motion and the cross-motion (4a).

Respondents thereafter timely answered the complaint, denying its material allegations (67a). At the same time, they moved for reargument of the district court's decision and order (63a). The district court granted reargument of respondents' motion to dismiss (13a) and held that the court lacked subject matter jurisdiction over petitioner's claim (*id.*). Accordingly, it directed the entry of an order of dismissal (17a).

On appeal, the Second Circuit affirmed unanimously (1a). "Because Sims requested the district court to review the decision of the New York Court of Appeals," the Second Circuit wrote (3a), "the district court properly dismissed her complaint for lack of subject matter jurisdiction."

Petitioner, who never sought review in this Court of the decision removing her from the bench, now asks this Court to review the decision of the Second Circuit affirming dismissal of her attempt to seek collateral review from the district court.

Reasons for Denying the Petition

The Second Circuit, in Unanimously Affirming Dismissal of the Complaint for Lack of Subject Matter Jurisdiction, Applied Law Already Settled by this Court, and its Decision does not Conflict with the Decision of any other Federal Court of Appeals.

Petitioner's argument here consists of an attempt to transform the decision of the Second Circuit into a holding that her complaint did not state a "justiciable cause of action" (Petition at 7). However, the court of appeals unanimously, and expressly, held that the district court "properly dismissed [petitioner's] complaint for lack of subject matter jurisdiction" (3a).* In her effort to reconstruct that decision here, petitioner completely ignores the one ground on which the Second Circuit wrote its decision.

Section 1257, 28 U.S.C., vests in this Court the jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." Such jurisdiction, this Court has established, is exclusive. *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983); *see also Zimmerman* v. *Grievance Committee*, 726 F.2d 85, 86 (2d Cir.), *cert. denied*, —— U.S. ——, 104 S. Ct. 2681 (1984). As a result, it is settled that the district courts lack subject matter jurisdiction to review the decisions of the highest court of a state. *Id.*; *see also Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923); *Tang* v. *Appellate Division, First Department*, 487 F.2d 138, 141 (2d Cir. 1973), *cert. denied*, 416 U.S. 906 (1974).

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* The Second Circuit, without further detail, also noted that it had "carefully reviewed [petitioner's] other claims" (3a) and found them to be without merit. *Id.*

Hence, the Second Circuit followed established law in affirming dismissal of petitioner's complaint for lack of jurisdiction. As the court of appeals recognized (Appendix 2a-3a), the complaint sought an injunction directing respondents to "rescind and vacate" the New York Court of Appeals decision removing petitioner from the bench (Appendix 54a). It also sought a corresponding judgment declaring that it was "constitutionally impermissible" for respondents, as the New York Court of Appeals, to remove her from that position for her misconduct (Appendix 55a). Petitioner sought no relief against respondents other than that the district court review, and declare null and void, the decision and order of the New York Court of Appeals.*

Thus, regardless of the nature of the harms alleged by petitioner, the district court was without authority to hear her action, which sought only to undo the decision and final order of the New York Court of Appeals. Petitioner therefore misses the mark by arguing that the issue raised is whether her complaint stated a claim under 42 U.S.C. § 1983. Because the district court lacked authority to hear any action—regardless of its nature—seeking review of a final judicial decision of the highest court of New York State, the district court properly did not make the subsequent inquiry of whether the complaint pleaded a claim, and the court of appeals properly upheld its dismissal of the complaint.

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* The proceeding before the New York Court of Appeals was a judicial proceeding. *Coruzzi* v. *State of New Jersey*, 705 F.2d 688 (3d Cir. 1983). *See Middlesex Co. Ethics Comm.* v. *Garden State Bar Ass'n*, 457 U.S. 423 (1982) (state bar disciplinary proceeding). The state Court of Appeals' jurisdiction over that judicial proceeding is established by N.Y. Const., art. VI, § 22, and was conceded by petitioner in her complaint (Appendix 39a).

Petitioner's reliance on *Pulliam* v. *Allen*, —— U.S. ——, 104 S. Ct. 1970 (1984), is similarly misplaced. *Pulliam* held that the doctrine of judicial immunity does not bar an action for prospective injunctive relief against a state court judge. The injunctive relief sought in *Pulliam*, however, did not seek to overturn a particular order or decision in a particular state court case. Moreover, neither *Pulliam* nor any of the other cases cited by petitioner (Petition at 9-10) involved any decision by the "highest court of a state in which a decision could be had", 28 U.S.C. § 1257, and therefore no question was raised by any of those cases concerning the exclusive jurisdiction of this Court to review such decisions.

Nor is there any merit to petitioner's contention that *Rooker* and *Tang* were "grounded on" principles of *res judicata* (Petition at 10-11). *Rooker* and the many cases which followed it, including *Tang*, were based on the jurisdictional conclusion that only this Court has the authority to review final judicial determinations of the highest court of a state. *District of Columbia Court of Appeals* v. *Feldman*; *Zimmerman* v. *Grievance Committee*. The issue in those cases, like the issue here, was jurisdiction, not *res judicata*.

And, for the same reason, petitioner's argument (Petition at 11-12) about a party's standing to raise a claim has no bearing on this case. Congress, in enacting 28 U.S.C. § 1257, and this Court, in deciding *Rooker* and *Feldman*, made clear that the district courts may not entertain any action which, like this one, seeks to nullify an order of the highest court of a state. The standing of parties is not in issue where, as here, the district court lacked subject matter jurisdiction.

Petitioner contends that the Second Circuit's decision in *Zimmerman* does not apply (Petition at 13-15) because, in that case, "everything necessary for federal appellate review was present in the existing record." Petitioner is mistaken. That argument once again fails to recognize that *Zimmerman,* like this Court's decision in *Feldman,* dealt with the subject matter jurisdiction of the district court over an action seeking a particular type of relief, not the substance of the allegations made or the state of the record presented.

The petition thus entirely misses the point of the Second Circuit's decision and that of the district court it unanimously affirmed. The issue is not, and has never been, whether petitioner's complaint stated a claim.* Rather, the issue decided by both courts below was that of subject matter jurisdiction, and both courts, following precedents set by this Court, correctly held that the district court lacked jurisdiction over petitioner's action.

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* Significantly, the only allegation made in the lengthy complaint regarding race (Appendix 44a, see also 32a) was that, in view of the fact that petitioner is black, her removal by the Court of Appeals, whose members, at the time, were "all members of the white race," has raised the "appearance of racism on the part thereof." There is no allegation anywhere in the complaint that the judges of the Court of Appeals based their decision on any grounds other than those set forth in the court's opinion, *Matter of Sims,* 61 N.Y.2d 349, 474 N.Y.2d 270, 462 N.E.2d 370, *rearg. denied,* 62 N.Y.2d 943, 479 N.Y.S.2d 1028, 468 N.E.2d 56 (1984). The opinion of the state's highest court set forth in detail the findings and reasoning upon which its final determination was based. In short, the jurisdictional issue bars the action, but the bar does not foster an injustice, real or apparent.

Conclusion

The Second Circuit's summary affirmance was based upon a simple application of the established law that only this Court has the authority to review a judicial determination of the highest court of a state, and that the district courts lack such authority. This case presents no special or important reasons calling for discretionary review by this Court.

Accordingly, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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